It would seem clear that an equity court should not lend its aid to the accomplishment through a receivership of a result which to all practical purposes renders ineffective the Bankruptcy Act, and which indirectly does the very thing which law condemns and pronounces void as a fraud on creditors. It is submitted, however, that such a result was effectuated by the county court in the recent case of *Thompson's Receivership* (1916) 44 Pa. C. C. 518. There, two unsecured creditors without judgments, obtained the appointment of a receiver in a friendly suit with the debtor. The plaintiffs showed no right to the property, no inadequacy of legal remedy and no necessity for summary relief, unless the fact that a debtor is unable to meet his obligations as they fall due, plus the hope that his condition with the aid of the court may at some time in the future be improved, is such a showing. The receivership was sought and granted avowedly for the purpose of staying executions and running the debtor's business pending the development of assets. Fortunately the Supreme Court of Pennsylvania reversed the decision, holding that the chancery court does not exist to aid in the accomplishment of any such object.

BURDEN OF ESTABLISHING WANT OF CONSIDERATION IN AN ACTION BETWEEN IMMEDIATE PARTIES TO NEGOTIABLE INSTRUMENTS.—If the common-law courts had assumed jurisdiction over causes of action involving mercantile obligations before the theory of consideration had come into the law, there might have been some basis for making such obligations subject to the rule requiring consideration. But such was not the fact.[1] Moreover, mercantile specialties at the time of their recognition by the common-law courts were binding of their own force[2] because the law merchant was not restricted in its enforcement of written instruments by any notion of consideration or *quid pro quo*. Therefore, the mere taking over of the law merchant by the common-law courts did not of itself furnish any reason for applying the doctrine of consideration to mercantile specialties. Furthermore, since the consequences flowing from the execution and delivery of a negotiable instrument have always been different from those flowing from a simple contract,[3] there was no real ground for subjecting the former class of obligations to the same rules as were applied to the latter. The writings of Lord Mansfield and Blackstone evidence the fact that the courts and authorities, at least for a time, recognized the soundness of this position.[4] However, as a result of *Rann* v. *Hughes*[5] negotiable instruments were placed in the same category as simple contracts, at

[1]The doctrine of consideration came into the law during the 16th century, Ames, Lectures on Legal History, c. 13, whereas the enforcement of the law merchant by common-law courts was not undertaken until the end of the 17th century. 1 Holdsworth, History of English Law, 333, 334.

[2]See Maylne, Lex Mercatoria, 74 *et seq.*, and 261; Marius, Bills of Exchange, *14; article by A. T. Carter in 17 Law Quarterly Rev. 232, at p. 242.

[3]2 Ames, Cases on Bills & Notes, 872-877; Langdell, Contracts (2nd ed.) 62 *et seq.*

[4]See 2 Bl. Comm., *446; Pillans & Rose *v.* Van Mierop & Hopkins (1765) 3 Burr. 1663.

[5](1778) 7 T. R. 350.

least to the extent of allowing the question of consideration to be raised in an action between the immediate parties.[6]

This historical analysis shows that the obligor on a negotiable instrument should never have been allowed the defense of want of consideration. It, therefore, lends force to the theory that want of consideration should operate as an affirmative defense and that the plaintiff should never be made to establish consideration as a part of his case. This theory finds substantiation in the practice of the equity courts to order the cancellation of a mercantile specialty for want of consideration as well as for fraud;[7] for equity would not grant relief unless it viewed want of consideration to be a matter of defense for the maker rather than a defect going to the inception of the obligation. Since equity did have jurisdiction, the law courts, upon making consideration a defense, presumably regarded it as an equitable defense and, therefore, affirmative. Furthermore, even if the view is taken that no obligation arises and there is no claim by the payee against the maker because no consideration was given, nevertheless the possession of the instrument certainly gives the possessor the power to obligate the maker by transferring the instrument to a holder in due course.[8] It seems reasonable, therefore, to place upon the maker the *onus* of establishing that the instrument is not the legal obligation it appears to be, and that it merely gives rise to a power to render the maker obligated, on principles of commercial law, to a holder in due course.

The proposition that want of consideration is an affirmative defense represents the weight of authority.[9] Those courts which do not assent

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[6]Langdell, *op. cit.*, 62 *et seq.* The accomplishment of this result was probably aided by the tendency of the common-law lawyers to adopt assumpsit as the simplest and most effective method of pleading a bill of exchange despite the fact that an action on the case on the custom was the original and more appropriate way of proceeding. 2 Ames, *op. cit.*, 872 *et seq.*; Chitty, Bills of Exchange (8th Am. ed.) 577.

The entire development towards requiring consideration in the case of mercantile instruments seems to have been based on a misconception. In the Van Mierop case, Lord Mansfield, when he said that written contracts required no consideration, was speaking only of negotiable instruments and contracts under seal. In Rann *v.* Hughes, which involved a simple contract, the court properly required consideration. The common-law lawyers, however, failing to see that the Van Mierop case applied only to negotiable instruments and contracts under seal, thought that the decision in the Rann case necessarily overruled the Van Mierop case. Langdell, *op. cit.*, 62 *et seq.*

[7]Newman *v.* Milner (1794) 2 Ves. Jr. *84; Metler *v.* Metler's Adm. (1867) 19 N. J. Eq. 457; see Culbertson *v.* Salinger & Brigham (Iowa, 1908) 117 N. W. 6. Relief is granted in such cases because a sale of the instrument to an innocent purchaser for value would leave the obligor without defense. Some courts, however, refuse to order cancellation. Anthony *v.* Valentine (1881) 130 Mass. 119. If such a denial of relief is to be justified, it must be on the theory that want of consideration is no defense at all because the maker intended that the payee should have the power to negotiate the instrument.

[8]17 Columbia Law Rev. 617.

[9]Pacific Improvement Co. *v.* Maxwell (1915) 26 Cal. App. 265, 146 Pac. 900; Gallagher, Adm. *v.* Kiley (1902) 115 Ga. 420, 41 S. E. 613; Cox *v.* Sloan (1900) 158 Mo. 411, 57 S. W. 1052; Greer *v.* George (1847) 8 Ark. *132; McMicken *v.* Safford (1902) 197 Ill. 540, 64 N. E. 540; see Newton *v.*

to it,[10] refuse to distinguish between a mercantile specialty and a simple contract. They argue that consideration is an essential element of a holder's cause of action and that the only burden on the defendant is that of going forward with sufficient evidence to rebut the presumption of consideration which always attaches to a negotiable instrument. The doctrine of consideration occupies so peculiar a position in the law of mercantile specialties[11] that, in applying it to such instruments, it seems improper to argue from any analogy to simple contracts. Furthermore, the contention, that the plea of general issue covers merely denials of the plaintiff's case and that hence want of consideration is a part of the plaintiff's case because the defendant may plead it under the general issue, is inconclusive; for it is clear that various affirmative defenses such as illegality and fraud may be proved under the general issue.[12]

In the recent case of *Shaffer* v. *Bond* (1917) 129 Md. 648, 99 Atl. 973, the question arose on exception to the charge of the trial judge that the burden of establishing want of consideration was on the defendant. The suit was under the Negotiable Instruments Law which seemingly codifies the weight of the common-law authority, and the court held that the charge was correct.

The Uniform Negotiable Instruments Law makes "absence or failure of consideration * * * matter of defense as against any person not a holder in due course".[13] This would seem to demand that failure and want of consideration should operate similarly as defenses.[14] If this is so, then, since failure of consideration is everywhere an affirmative defense, it would follow that the same should be

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Newton (1890) 77 Tex. 508, 14 S. W. 157; South Dakota Central Ry. *v.* Smith (1908) 22 S. D. 210, 116 N. W. 1120; Carnwright *v.* Gray (1891) 127 N. Y. 92, 27 N. E. 835; *cf.*, Ragsdale *v.* Gresham (1904) 141 Ala. 308, 37 So. 367 (defendant, acceptor of bill of exchange); Lacey *v.* Forrestor (1835) 5 Tyr. 567 and Stoughton *v.* Earl of Kilmorely (1835) 5 Tyr. 568 (defendants, accommodation makers).

[10]Burnham *v.* Allen (1854) 67 Mass. 496; Small *v.* Clewley (1871) 62 Me. 155; see Stevenson *v.* Gunning's Estate (1892) 64 Vt. 601, 25 Atl. 697. Some courts even go so far as to make the holder of a negotiable instrument prove consideration against an accommodation party. Lombard *v.* Bryne (1907) 194 Mass. 236, 80 N. E. 489; Best *v.* Rocky Mt. Nat'l. Bank (1906) 37 Colo. 149, 85 Pac. 1124. This, it is submitted, is wrong; for a plea of accommodation is in its essence a confession and avoidance, the defendant in effect saying "I made the instrument, but the consideration for it, to wit, your agreement not to sue, is a bar to your action".

[11]This is illustrated by the fact that, in an action by a holder in due course against the maker, proof of want of consideration between the immediate parties to the instrument in no way affects the presumption of *bona fides* so as to shift the burden of going forward with proof of value or good faith to the holder, Milnes *v.* Dawson (1850) 5 Exch. 947; Harger *v.* Worrall (1877) 69 N. Y. 370, whereas proof of fraud in the inception or transfer of the instrument does accomplish that result. Cox *v.* Cline (1908) 139 Iowa 128, 117 N. W. 48; see 1 Daniels, Neg. Inst. (6th ed.) § 165.

[12]Craig *v.* Missouri (1830) 29 U. S. 410.

[13]§ 28 [N. Y. § 54].

[14]Carter *v.* Butler (1915) 264 Mo. 306, 174 S. W. 399; see Ferguson *v.* Netter (1910) 141 App. Div. 274, 126 N. Y. Supp. 107.

true of want of consideration.[15] Inasmuch as the purpose of the act was to secure uniformity,[16] it is to be deplored that the courts have reached conflicting conclusions in their interpretation of it.[17] It is submitted that, in view of the need of commercial certainty and of the wording of the act, the burden of establishing want of consideration should be on the defendant, and that the court in the instant case was correct in sustaining a charge to that effect.

[15]See cases in footnotes 15, *supra*, and 17, *infra*. Want of consideration is not included in § 55 [N. Y. § 94] which defines defective title within the meaning of the act. Nor would it seem to constitute an infirmity under § 52 (4) [N. Y. 91 (4)]. For, though what would be an infirmity is a matter of some doubt, yet it would seem that the sound construction would include only those cases to which the act refers: ineffectual delivery of the instrument, § 16 [N. Y. § 35]; exceeding of authority by an agent in the making of the instrument, § 19 [N. Y. § 38]; completion of the instrument in an unauthorized manner, § 14 [N. Y. § 33]. Therefore, since one who takes without notice of infirmities or defect of title is a holder in due course under § 52 [N. Y. § 91], a purchaser for value in good faith would be a holder in due course even though he had notice that as between the immediate parties there was want of consideration. *Cf.*, Black *v.* Bank of Westminster (1903) 96 Md. 399, 54 Atl. 88 (where endorsee for value but with notice of accommodation was allowed recovery against the accommodation maker). If he is a holder in due course, then under § 57 [N. Y. § 96] he takes free of defects of title of which he had no notice and likewise he takes free of defenses. Since the sections noted above as dealing with cases of infirmities provide for the effect of infirmity upon negotiations to holders in due course, "defenses" as used here would not apply to them. It would seem rather to apply to failure and want of consideration, thereby supporting the contention that want of consideration is not a part of the plaintiff's case but is a matter of defense.

[16]See Brewster *v.* Schrader (1899) 26 Misc. 480, 57 N. Y. Supp. 606; Brannan, Neg. Inst. (2nd ed.) 1.

[17]Some courts have held want of consideration to be an affirmative defense. Piner *v.* Brittain (1914) 165 N. C. 401, 81 S. E. 462; Carter *v.* Butler, *supra*; see New York Metal Ceiling Co. *v.* Leonard (1905) 48 Misc. 500, 96 N. Y. Supp. 187; Ferguson *v.* Netter, *supra*; Preas *v.* Vollintine (1909) 53 Wash. 137, 101 Pac. 706. Others hold that the burden of establishing is upon the plaintiff. Bank of Gresham *v.* Walch (1915) 76 Ore. 272, 147 Pac. 534; Ginn *v.* Dolan (1909) 81 Ohio 121, 90 N. E. 141; Cawthorpe *v.* Clark (1912) 173 Mich. 267, 138 N. W. 1075; Huntington *v.* Shute (1902) 180 Mass. 371, 62 N. E. 380; Mechanics & Metal Nat'l. Bank *v.* Termine (1915) 93 Misc. 1, 156 N. Y. Supp. 433.